Supreme Court, U. S.
FILED
NOV 18 1975
MICHAEL RODAK, JR., CLERK

No. 75-155

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

JAMES V. LARKIN, DOMINIC VENTRE,
FRANK CHILLEMI, GERALD KATZ, ET AL., PETITIONERS,

v.

JOHN R. PATTERSON, NEWSPAPER AND MAIL DELIVERERS UNION OF NEW YORK AND VICINITY, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NEW YORK DAILY NEWS, NEW YORK TIMES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinions of the Court of Appeals (Pet. App. 1a-20a) are reported at 514 F.2d 767. The opinion and order of the District Court for the Southern

District of New York (Pet. App. 22a-43a) are reported at 384 F.Supp. 585.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1975. A petition for a rehearing was denied on April 29, 1975. The petition for a writ of certiorari was filed or July 28, 1975. Jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the settlement agreement approved by the District Court treats intervenors, who are white, in a manner which is fair and consistent with Title VII's objectives.

STATEMENT

This is a consolidated action of two Title VII suits filed in the Southern District of New York in 1973, one by minority employees of various publishers and one by the United States under Section 707 of the Civil Rights Act of 1964.[1] Plaintiffs below alleged discrimination against minorities in the newspaper and publications delivery industry in the New York metropolitan area. Specifically, the actions charged that the union, with the acquiesence of the publishers and distributors, had historically discrimi-

[1] The Equal Employment Opportunity Commission was substituted as plaintiff pursuant to Section 707(c) and (d) of Title VII.

nated against minorities in its admission policies, and that the structure of the collective bargaining agreement perpetuated the effects of this past discrimination.

Petitioners are white, non-union workers who were allowed to intervene to challenge relief affecting their interests. After a four-week trial, plaintiffs and defendants executed a settlement agreement which was approved by the district court over petitioners' objections after the court held separate hearings on the reasonableness of relief with respect to the plaintiffs' class and on the legality of the impact on intervenors.[2]

A. Background

The pertinent facts are stated in the district court (Pet. App. 21a-43a) and the appellate court (Pet. App. 1a-20a) opinions.

Because of the variation in the size and quantity of publications to be distributed on a given day, needs for personnel within the publication delivery industry vary from day to day and shift to shift. Employers in the industry therefore rely not only on a regular work force with permanently assigned jobs, known as regular situation holders, but on daily extra shapers to cover extra work as it is required. All jobs within the industry, whether regular situation or daily shaper, are relatively unskilled and essentially the same. Duties consist either of

[2] The settlement agreement was approved September 19, 1974, and the decree became effective November 11, 1974.

driving trucks or floor work. The primary advantages of the regular situation holder are the frequency and regularity with which work is available to him. A regular situation is a prerequisite for union membership. Historically, the union, which was 99% white, limited membership to the first born sons of members.

The daily shapers are divided into a four-tiered group structure with descending daily hiring priorities. The group structure also determines priority for filling regular situations as they become vacant.

The group I list has shaping priority at each shift and is limited to men who once held a regular situation in the industry. The group II list is an aggregate industry-wide list consisting of all regular situation holders and group I shapers. It has daily hiring priority after each employer's group I list is exhausted at a given shift. Persons in group II can use their group II status to obtain extra work with employers other than their own within the industry.

Each employer also maintains a group III list which has shaping priority after all men in groups I and II are put to work. Group III shapers, whose members include both the plaintiff minority workers and the intervenors in this action, are those men who have never held a regular situation anywhere in the industry. Group IV shapers work only after the group III list is exhausted and are only required to shape occasionally.

No group III shaper had achieved regular situation and union membership since 1963. Of the 2,855

persons who are actively working in the industry, only 70, or approximately 2%, are minority persons.[3] Most of the 272 persons on the group III lists are employed by two major newspapers. Thirteen of the 178 group III members at the New York News are minority persons as are six of the 34 at the New York Times.

B. The Settlement Agreement

In approving the settlement agreement the district court found that the nepotistic policy of the union prior to 1952 resulted in discrimination against minorities (Pet. App. 29a). In fact, the court noted that the effect of the union's policies was to "foreclose minorities from employment in the industry" (Pet. App. 29a).[4] The court also found that the group structure instituted in 1952, although apparently neutral, had been circumvented by friends and family of union members, and had operated to lock in minorities at the non-union entry level and thereby to perpetuate the impact of past discrimination against them in violation of Title VII (Pet. App. 31a). To rectify this present impact the court ap-

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[3] As used herein and in the agreement, minority means Black, Spanish-surnamed, Oriental or American Indian males.

[4] The Court of Appeals noted that "[a]side from the chilling effect which restriction of Union membership to whites might by itself have upon minority persons seeking delivery work, there is evidence that minorities were also discouraged from gaining entrance to Group III lists, even though Group III shapers are not members of the union" (Pet. App. 6a).

proved the affirmative relief embodied in the settlement agreement.

The salient provisions of that agreement are:

1) A goal of 25% minority employment in the industry to be met by June 1, 1979. Until that goal is achieved, employers shall hire, at the entry level, three minority persons for every two non-minority person (Pet. App. 32a; 33a).

2) The contract provision which restricts group I membership to former regular situation holders is eliminated (Pet. App. 33a).

3) Minorities presently active on the group III list at the News and the Times will move immediately to the bottom of the group I list, with an equal number of non-minorities to follow them into the group I list (Pet. App. 33a).

4) Group III shapers shall move in an orderly flow—alternating one minority with one non-minority—into steady and secure employment in the industry, first as members of group I, and then, as regular situations become vacant, to regular situations (Pet. App. 33a).

5) Voluntary transfers from one employer to another are eliminated as barring the advancement of group III shapers into permanent regular situations (Pet. App. 7a).

6) An administrator will supervise the plan and insure that work opportunities will be made available to any group III person who is unable to get 45 shifts of work within a calendar quarter (Pet. App. 36a).

7) Minority group III members will be awarded pension benefits that they would have earned absent discrimination against them (Pet. App. 33a).

8) Incumbent minority employees will share in a $5,000 back pay fund (Pet. App. 34a).

ARGUMENT

Petitioners' attacks on the validity of the settlement agreement as affecting their rights are fully answered in the opinion of the district court (Pet. App. 21a-43a) and the opinion of the court of appeals (Pet. App. 1a-20a). As both courts pointed out, petitioners, who are white non-union employees (group III shapers), receive substantial benefits under the terms of the settlement agreement. For the first time petitioners have a realistic expectation of advancement to a regular situation in the industry and to union membership. Indeed, they are virtually assured of such advancement within a short period of time (Pet. App. 16a).[5] In addition, petitioners receive other substantial benefits that they never enjoyed before, such as seniority over persons transferring to the group I list from another employer, a promotion rate of one position in seniority

[5] The district court noted that petitioners have previously attacked the union's abuses and practices in other forums and under different statutes to no avail (Pet. App. 35a). Thus, this Title VII action by and on behalf of their minority coworkers provides petitioner-intervenors with the relief from union nepotism and cronyism which they have long sought on their own account.

in group I for each regular situation filled, and the protection provided by an impartial administrator who will insure that work opportunities are made available to group III members.

The agreement provides certain additional relief to minority group II members, including immediate promotion to the group I list for nineteen incumbent minorities in group III, and a one-for-one minority to non-minority flow from group III shaper status to group I. This relief is justified because minorities have been effectively foreclosed from gaining group I status and regular situation positions in the industry even though there are no special skills required to fill the jobs involved. This relief is designed to eliminate the effects of past unlawful discrimination by proceeding towards a representation of minorities in the news delivery industry consistent with their strength in the relevant population. Less vigorous remedial measures such as that suggested by petitioner—promotion from group III strictly along lines of seniority—would fail to promptly neutralize the effects of long-standing and statutorily proscribed discriminatory employment policies.[6]

Petitioners' argument that they should receive the identical relief as minority workers mistakes the remedial thrust of Title VII (see Pet. Br. 11-12). That statute prohibits discrimination on the basis of specifically enumerated characteristics, amongst which are race and national origin. It does not prohibit all employment policies which are arbitrary or unfair to workers, but is addressed to those policies which have a negative impact on Title VII protected classes. Although petitioners as individuals have suffered the effects of the union's nepotism, their class (whites) has not been foreclosed from employment opportunities in the industry, nor have they suffered the same diminished expectations for advancement as their group III minority counterparts (Pet. App. 7a; 16a-17a; 29a).

Contrary to petitioners' assertions (Pet. Br. 11-12), *United States* v. *Roadway Express, Inc.*, 457 F.2d 854 (C.A. 6), does not stand for the proposition that previously disadvantaged blacks and whites *must* be afforded the same relief. The Court in *Roadway* held only that a district court acted within its equitable discretion in entering a consent order providing relief for white as well as black city truck drivers under circumstances where white city drivers had been denied the right to transfer to more lucrative over-the-road driving jobs only as a necessary part of the company's refusal to permit blacks to transfer to those jobs.

The lower court here did much the same as the *Roadway* court. Although not required to do so, it elected to extend substantial relief to petitioners as well as to Title VII minority discriminatees.

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[6] As the district court recognized, minorities have been so impeded from obtaining jobs in the industry—they are presently 2% of the industry and are only 19 of the 212 employees on the group III lists of the News and Times—that hiring minorities in substantial numbers is crucial to breaking the white profile of the industry (see Pet. App. 30a; 31a; 39a).

Petitioners' argument that the settlement agreement permits bumping of employees who have vested seniority rights is inaccurate, as the appellate court in this action recognized (Pet. App. 15a). Petitioners—white, non-union workers—retain their positions and are not delisted. As group III workers, they do not have and have never had seniority rights which assure them of steady employment. They merely compete for a limited quantity of work, the amount of which fluctuates greatly on a day to day basis. Accordingly, the actual impact of the decree on their employment expectations is difficult to gauge. Moreover, any adverse impact will be of relatively short duration (see Pet. App. 16a) and is further mitigated by the new benefits and protections established by the decree.

Finally, the additional relief afforded to minority co-workers, which the court and the parties deemed essential to eliminating racial discrimination in the industry, is not contrary to the expressed will of Congress in enacting Section 703(j) of Title VII. Section 703(j) was meant to bar preferential treatment of minorities as a means of changing racial imbalance attributable to causes other than unlawful discriminatory conduct. It does not prohibit affirmative action to eradicate the effects of past discriminatory practices. *Rios* v. *Enterprise Association Steamfitters Loc. 638 of U.A.*, 501 F.2d 622, 630 (C.A. 2). *Accord: United States* v. *Ironworkers, Local 86*, 443 F.2d 544, 553-554 (C.A. 9), certiorari denied, 404 U.S. 984; *Contractors Assn. of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (C.A. 3),

certiorari denied, 404 U.S. 854; *United States* v. *IBEW, Local 38*, 428 F.2d 144, 149-150 (C.A. 6), certiorari denied, 400 U.S. 943.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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I authorize the filing of this brief.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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